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TEO SUI CHIN & ORS v. REGISTRAR OF LAND AND SURVEY, KUCHING DIVISION & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
ALEXANDER SIEW HOW WAI JC
[ORIGINATING SUMMONS NO: KCH-24NCvC-5-2-2020]
B 12 OCTOBER 2022

Abstract – *An easement right of way of necessity will come to an end when the necessity ceases, even if the terms of the easement right of way contain no express provision that the easement right of way was only for so long as the necessity persists.*

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CIVIL PROCEDURE: *Mode of commencement – Originating summons – Appeal against decision of Registrar of Land and Survey – Whether originating summons correct mode of commencement – Whether should have applied for judicial review – Whether matter under private law – Rules of Court 2012, O. 53 & O. 55A(1)*

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LAND LAW: *Easement – Right of way – Extinguishment – Cancellation of easement of right of way – Alternative access available – Whether application filed within time – Whether extinguishment of 'easement of right of way' in contravention of order of Court of Appeal – Easement right of way of necessity – When easement right of way will come to end*

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The plaintiffs were the registered co-proprietors of a property ('Lot 255'). The third defendant was the registered proprietor of the adjoining land ('Lot 254'). Lots 254 and 255 came about from the subdivision of a parent Lot 29.
F Lot 29 was subdivided into six parcels of land, including Lots 254 and 255. As part of the subdivision, an easement right of way was granted in favour of Lot 255 over Lot 254. In addition to the 'easement right of way' in respect of Lots 254 and 255, a similar easement right of way was granted in respect of two other parcels, in favour of Lots 256 and 257. These easements right
G of way were granted in favour of Lots 255 and 256 because without the right of way, Lots 255 and 256 would be landlocked with no access to the then only public roads serving those lots, Jalan Green and Jalan Ong Kee Hui respectively. Although the easement right of way was stated to be 16 feet in width, the original owners/developers constructed an access road of less than
H 16 feet wide. There was no issue between the respective owners of Lots 254 and 255 over the 'easement right of way' at first. In 2014, the third defendant who inherited Lot 254 in 2012 from her late husband, erected a concrete base fence along the side of the access road. The plaintiffs, the co-owners of Lot 255, complained that this resulted in the access to Lot 255 being less than 16 feet wide. The plaintiffs sued the third defendant over the matter in the
I High Court while the third defendant counterclaimed. The High Court

dismissed the claim and counterclaim save for the grant of the second declaration sought that the third defendant was entitled to maintain the new concrete base fence. Essentially, the High Court Judge ('HCJ') took the view that the plaintiffs and their predecessors in title had waived their rights to the part of the easement right of way which did not form the access road. Although the HCJ did not grant the declaration sought by the third defendant *ie* that the third defendant was entitled to apply to the relevant authority for the cancellation of the easement of right of way on the grounds that there was now an alternative access, the HCJ made it clear that the third defendant was so entitled to apply and that the declaration was not necessary. The plaintiffs appealed to the Court of Appeal and the appeal was allowed. Following the Court of Appeal's decision, the third defendant applied to the Federal Court for leave to appeal against the Court of Appeal's decision. The Federal Court dismissed the leave application. Subsequent to the dismissal, the third defendant submitted an application to the Superintendent of Lands and Surveys for the extinguishment of the easement right of way on the basis that there was now an alternative access to Lot 255 in the form of Persiaran Cooke. A decision was made by the first defendant to proceed with the extinguishment and the easement right of way was removed from the titles of Lots 254 and 255. However, the Lands and Surveys Department did not inform the plaintiffs of the decision to proceed with the extinguishment. Hence, the present appeal against the decision of the first defendant by way of originating summons ('OS'). The issues that arose were: (i) whether the mode of action was correct; (ii) whether the plaintiffs were out of time; (iii) whether the plaintiffs had to request for written grounds first under s. 203 of the Land Code (Sarawak) (Cap 81) ('SLC') before filing the appeal; (iv) whether the Registrar erred in the extinguishment of the easement right of way and whether there was an alternative access to Lot 255 in the form of Persiaran Cooke; (v) whether the extinguishment of the easement of right of way was in contravention of the order of the Court of Appeal.

Held (dismissing originating summons):

(1) The defendants submitted that the instant OS was flawed, in that, the plaintiffs should have applied for judicial review of the Registrar's decision instead of filing this appeal by way of OS. The plaintiffs, being dissatisfied with the decision of the first defendant in respect of the extinguishment of the 'easement right of way', were entitled to invoke ss. 203-206 of the SLC to file the instant appeal. As for the mode of commencement, this was provided under O. 55A(1) of the Rules of Court 2012 ('ROC'). Putting aside ss. 203 to 206 of the SLC, the instant dispute was essentially a matter under private law *albeit* concerning a public authority. If the matter was under private law, although concerning a public authority, the mode to commence action under O. 53 of the ROC was not suitable. (paras 41, 47 & 48)

(2) At some stage, the Lands and Surveys Department must have made the assessment or decision that the plaintiffs had failed to show cause and the Department proceeded with the extinguishment. To constitute notification to the plaintiffs, the Department would have to inform the plaintiffs of the decision, whether orally or in writing. There was no evidence of the plaintiffs being informed of the decision whether orally or in writing and neither did the defendants contend otherwise. Neither was it seriously disputed that the plaintiffs only came to know of the extinguishment on 21 February 2020, following a letter from the third defendant dated 14 February 2020. The instant OS was filed on 27 February 2020, six days later, and therefore was well within the statutory one-month deadline. (para 55-59)

(3) The court could not agree with the submission that a request for written grounds must have been made before an appeal could be filed or that a failure to make such request would render the appeal fatally defective. The operative word in s. 203 of the SLC is 'may', which means it is elective and not mandatory. Secondly, s. 204 did not say 'written grounds' or 'grounds in writing' but merely 'grounds'. More importantly, neither ss. 203 nor 204, whether construed separately or read together, contained any requirement that a person appealing must first request for written grounds first before filing an appeal. (paras 63-66)

(4) The easement right of way came about as a result of a sub-division of a parcel of land under s. 10 of the Land (Control of Sub-Division) Ordinance Cap 82 ('Ordinance'). Nothing turned on whether the 'easement right of way' in the instant case was created under s. 34 of the SLC or s. 10 of the Ordinance; the easement right of way was an easement of necessity, created for the purpose of allowing land (Lot 255) which would otherwise be landlocked, access to a public road. As an easement of necessity, the easement right of way would come to an end when the necessity ceases. Moreover, it was clear that Lot 255 could be accessed through Persiaran Cooke. (paras 74-76 & 96)

(5) The plaintiff submitted that the matter was already *res judicata* and that the extinguishment of the easement right of way was in contravention of the decision/order of the Court of Appeal. There was no merit in this submission. Although the High Court did not grant the declaration sought by the third defendant that she was entitled to apply to the Lands and Surveys Department for the extinguishment of the 'easement right of way', the HCJ made it clear that the court did not do so because it was not necessary and that it was a given the third defendant was so entitled. The appeal before the Court of Appeal did not concern this part of the judgment and neither did the Court of Appeal comment on this part of the judgment as the grounds of decision of the Court of Appeal made clear. (paras 115-118)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chin & Sons (1995) Sdn Bhd & Ors v. William Crocket & Ors [1997] 4 CLJ Supp 111 HC ***(refd)***

Chin & Sons (1995) Sdn Bhd & Ors v. William Crocket & Ors [2000] 1 LNS 3 HC ***(refd)***

Lichty v. Sickels, 149 Cal App 3d 696 ***(refd)***

Lye Thean Soo & Ors v. Sykt Warsaw [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 SC ***(refd)***

Teo Sui Chin & Ors v. Lim Siok Luan [2016] 1 LNS 42 HC ***(refd)***

Teo Sui Chin & Ors v. Lim Siok Luan [2019] 10 CLJ 313 CA ***(refd)***

The State Government of Sarawak & Ors v. Teo Soo Chuan [2014] 5 CLJ 68 CA ***(refd)***

Legislation referred to:

Land Code (Sarawak) (Cap 81), ss. 34, 141, 203, 204, 205(1), (2), 206
National Land Code, s. 389
Rules of Court 2012, O. 55A r. 1(1), (3)

Land Transfer Act 1952 [NZ], s. 70
Property Law Act 1952 [NZ], s. 127
The Indian Easements Act 1882 [Ind], s. 41

For the plaintiffs - Ronald Ong; M/s Chong Brothers Advocs
For the 1st & 2nd defendants - Nur Azhar Bujang; SLO, Sarawak
For the 3rd defendant - Chan Siew Yan; M/s Ee & Lim Advocs

Reported by Lina E

JUDGMENT

Alexander Siew How Wai JC:

[1] This was an appeal from a decision of the first defendant the Registrar of Lands and Surveys Kuching Division, in respect of the extinguishment of an "easement right of way".

[2] By the instant originating summons, the plaintiffs prayed for the following reliefs:

(1) an order that the 1st defendant do within 14 days of this Order, set forth and serve to the plaintiffs' advocates in writing the grounds of the 1st defendant's decision to register instrument No. L.25744/2019 of 14.11.2019;

(2) a declaration that the 1st defendant's decision to find that the registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District *vide* Memorandum of Endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L2396/66 of 23.6.1966 has been determined or extinguished is erroneous because it is in contravention with the final Court of Appeal Order dated 18.10.2016 in Civil Appeal No. Q02(NCVC)(W)-137-01/2016 which is a *res judicata* between the plaintiffs and 3rd defendant;

A (3) a declaration that the 1st defendant's decision to register instrument No. L.25744/2019 of 14.11.2019 to extinguish the registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District *vide* Memorandum of Endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L2396/66 of 23.6.1966 is wrongful and
B ought to be set aside;

(4) an order that the 1st defendant do forthwith set aside the registration of instrument No. L.25744/2019 of 14.11.2019 in the Land Register, do forthwith restore the registration of instrument L2396/66 of 23.6.1966 in the Land Register and do forthwith restore
C the endorsements of instrument L2396/66 of 23.6.1966 on the respective titles for Lot 254, Section 18, Kuching Town Land District and Lot 255, Section 18, Kuching Town Land District and upon any relevant instrument relating thereto;

(5) further or in the alternative, an order that the 1st defendant do
D forthwith register upon the Land Register, upon the respective documents of titles of both Lot 254, Section 18, Kuching Town Land District and Lot 255, Section 18, Kuching Town Land District and upon any relevant instrument relating thereto "an access road of an uniform width of 16 feet on Lot 254 Section 18 Kuching Town Land District as a registered easement right of way appurtenant to
E Lot 255 over Lot 254 Section 18 Kuching Town Land District *vide* Memorandum of Endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L2396/66 of 23.6.1966 as finally upheld by the Court of Appeal *vide* Court of Appeal Order dated 18.10.2016 in Civil Appeal No. Q-02(NCVC)(W)-137-01-2016";

F (6) an order that the 3rd defendant shall be restrained and an injunction shall be granted to restrain the 3rd defendant whether by herself or her agents or her servants or nominees or otherwise from preventing the plaintiffs whether by themselves or their agents or their servants or nominees or otherwise unrestricted usage and/or
G access to the access road of an uniform width of 16 feet on Lot 254 Section 18 Kuching Town Land District, an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District as finally upheld by the Court of Appeal in Order dated 18.10.2016 in Civil Appeal No. Q-02(NCVC)(W)-137-01-2016;

H (7) an order that the 3rd defendant shall be restrained and an injunction shall be granted to restrain the 3rd defendant whether by herself or her agents or her servants or nominees or otherwise from building or causing to be built any buildings or other erections upon the access road of an uniform width of 16 feet on Lot 254 Section 18 Kuching Town Land District, an easement right of way
I appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District as finally upheld by the Court of Appeal in Order dated 18.10.2016 in Civil Appeal No. Q-02(NCVC)(W)-137-01-2016;

(8) as against the 1st and 2nd defendants, general damages and aggravated damages or exemplary damages;

(9) as against the 3rd defendant, general damages and aggravated damages or exemplary damages;

(10) costs; and

(11) such further and/or other relief as this Honourable Court deems fit and proper in the circumstances and/or relief to give effect to the declarations claimed under prayers (2) and (3) above.

[3] Prayer no. (1) (that the first defendant Registrar provide the grounds for the decision) was ultimately abandoned, after the first defendant Registrar filed an affidavit explaining the extinguishment of the "easement right of way".

[4] After reviewing the cause papers and the extensive written submissions and hearing from counsel for the parties, the court dismissed the appeal.

Background

[5] The plaintiffs were the registered co-proprietors of Lot 255, Section 18, Kuching Town Land District, which has a house known as No. 155A, Jalan Green (hereinafter "Lot 255").

[6] The third defendant was the registered proprietor of the adjoining land, Lot 254, Section 18, Kuching Town Land District, which has a house known as No. 155, Jalan Green (hereinafter "Lot 254").

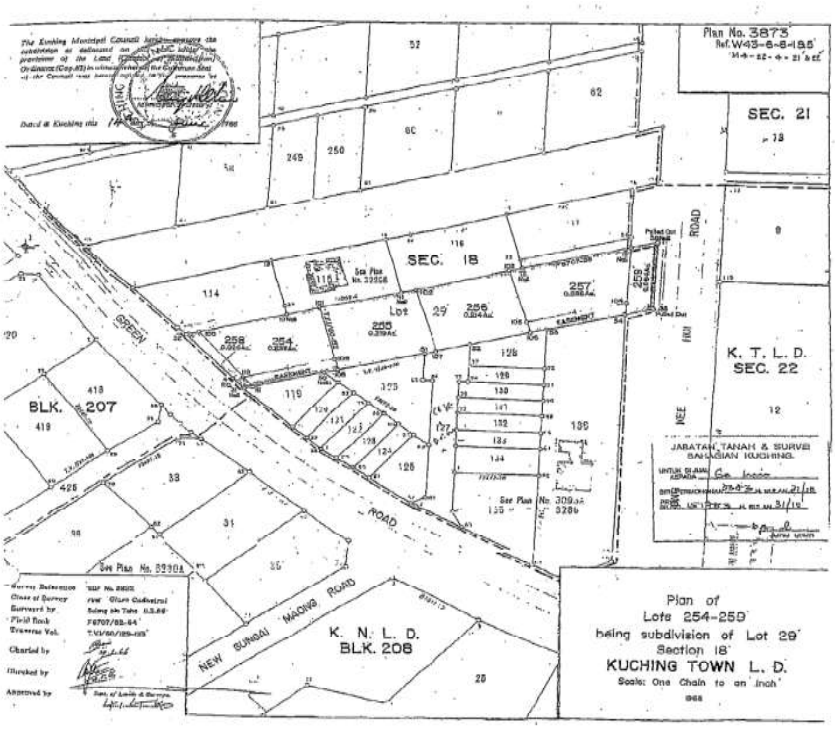
[7] Lots 254 and 255 came about from the subdivision of a parent Lot 29, Section 18, Kuching Town Land District in 1966, whereby the parent Lot 29 was subdivided into six parcels of land including Lots 254 and 255.

[8] As part of the subdivision, an 'easement right of way' was granted in favour of Lot 255 over Lot 254.

[9] In addition to the "easement right of way" in respect of Lots 254 and 255, a similar "easement right of way" was granted in respect of two other parcels, in favour of Lot 256 over Lot 257.

[10] It is clear looking at the subdivision plan, these 'easements right of way' were granted in favour of Lot 255 and Lot 256 because without the right of way, Lots 255 and 256 would be landlocked, with no access to the then only public road serving those lots, Jalan Green and Jalan Ong Kee Hui respectively.

[11] The subdivision plan, Survey Plan No. 3873 is shown below:



[12] The endorsement on the titles of Lot 254 and Lot 255 read as follows:

> Easement:
>
> That an access road of an uniform width of 16 feet be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District. *Vide* Memorandum of endorsement of conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L2396/66 of 23.6.1966.
>
> (sgd) Lee Ik Chai
> Asst. Registrar

[13] The above referred Memorandum of Endorsement No. L2396/66 is reproduced below:

A

MEMORANDUM OF ENDORSEMENT OF CONDITIONS OF SURVEY PLAN APPROVED UNDER THE LAND (CONTROL OF SUBDIVISION) ORDINANCE (CAP.82)

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To:
The Registrar,
Land Registry Office, Kuching.

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WHEREAS the Kuching Municipal Council has approved a Survey Plan No. 3873 showing the subdivision of the parcel of land described in the First Schedule hereto into six parcels of land as described in the Second Schedule hereto;

AND WHEREAS Teo Ee Ping (S.I.C.557108) and Teo Aik Kuong (NRIC.S.011434) both of No. 2, Tabuan Road, Kuching being the registered co-proprietors of the land described in the First Schedule hereto have agreed to the conditions of the said Survey Plan as approved by the Kuching Municipal Council.

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AND WHEREAS under Section 10 of the Land (Control of Subdivision) Ordinance the Director of Lands and Surveys is directed to make or cause to be made in the Land Register an endorsement to the effect that any land in a development area affected by any survey plan approved under the said Ordinance, and subject to section 21 thereof, shall be subject to the conditions of the approved survey plan where such survey plan has been approved subject to conditions;

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AND WHEREAS the Director of Lands and Surveys has authorised the Superintendent of Lands and Surveys, First Division, to execute this Memorandum and to cause an endorsement to be entered in the Land Register;

NOW THEREFORE I, Anthony Frederic Porter Superintendent of Lands and Surveys, First Division, do hereby require that the appropriate endorsement of the conditions of the approved Survey Plan as set out in the Third Schedule hereto be made against the Land Registers relating to the parcels of land described in the First Schedule and Second Schedule hereto.

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Dated this 22nd day of June, 1966.

FIRST SCHEDULE

All that parcel of land situated at Green Road, Kuching, containing 1.00 acre, more or less, and described as Lot 29 Section 18 Kuching Town Land District.

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SECOND SCHEDULE

All those six parcels of land situated at Green Road, Kuching and described as:-

1) Lot 254 Section 18 Kuching Town Land District, containing 0.239 acre, more or less;

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CERTIFIED TRUE COPY

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ii) Lot 255 Section 18 Kuching Town Land District, containing 0.219 acre, more or less;

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iii) Lot 256 Section 18 Kuching Town Land District, containing 0.214 acre, more or less;

iv) Lot 257 Section 18 Kuching Town Land District, containing 0.238 acre, more or less;

v) Lot 258 Section 18 Kuching Town Land District, containing 0.026 acre, more or less; and

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vi) Lot 259 Section 18 Kuching Town Land District, containing 0.064 acre, more or less.

THIRD SCHEDULE

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i) That an access road of an uniform width of sixteen feet be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District; and

ii) That an access road of an uniform width of fifteen feet be registered as an easement right of way appurtenant to Lot 256 over Lot 257 Section 18 Kuching Town Land District.

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DEPARTMENT OF LANDS & SURVEYS FIRST DIVISION SARIKEI

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Superintendent of Lands and Surveys,
First Division.

2396/1966 LAND REGISTRY OFFICE KUCHING

Memorial made this 22nd day of June, 1966.
at 9.10 o'clock a.m.

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Assistant Registrar.

at./Svy. 372/65.

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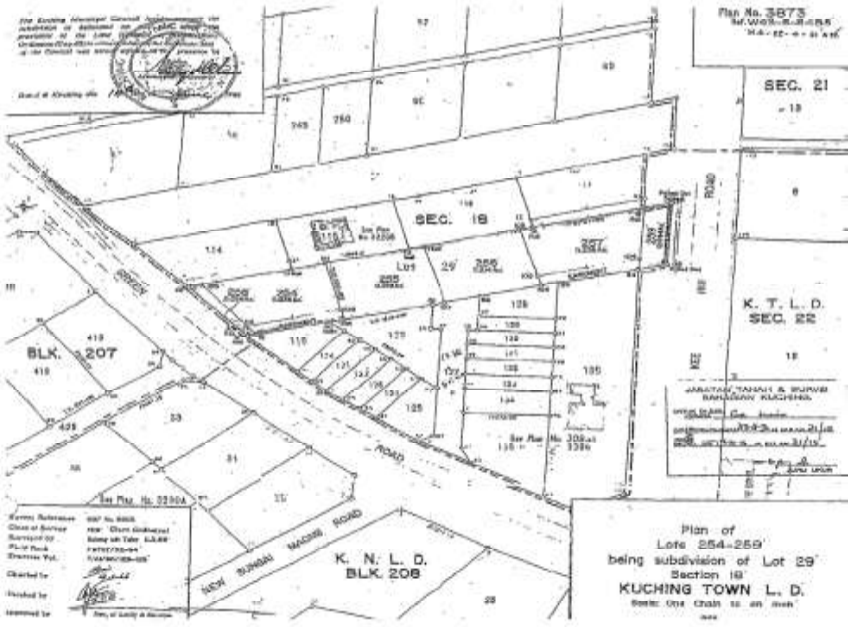

[14] At the time of the approval of the sub-division plan in 1966 under the Land (Control of Sub-Division) Ordinance Cap 82, the approval would be by the local authority in question, in this case, the Kuching Municipal Council and this was referenced in paras. 1 and 2 of the memorandum of endorsement.

[15] The Land (Control of Sub-Division) Ordinance Cap 82 was later amended in 1972, whereby the approving authority was changed to the Director of Lands and Surveys instead of the local authority.

[16] Although the "easement of right way" was stated to be 16 feet in width, it appears the original owners/developers constructed an access road of less than 16 feet wide.

[17] For the next 48 years, it seems there was no issue between the respective owners of Lots 254 and 255 over the "easement of right way".

[18] In 2014, the third defendant who inherited Lot 254 in 2012 from her late husband who became the owner of Lot 254 in 1991, erected a concrete base fence along the side of the access road.

[19] The plaintiffs, the co-owners of Lot 255 took exception to the concrete base fence, complaining that it resulted in the access to Lot 255 being less than 16 feet wide.

[20] The plaintiffs ended up suing the third defendant over the matter in the High Court at Kuching (*Teo Sui Chin & Ors v. Lim Siok Luan* [2016] 1 LNS 42; [2017] 7 MLJ 613).

[21] The plaintiffs' statement of claim is reproduced below:

1. The Plaintiffs are the registered proprietors of Lot 255 Section 18 Kuching Town Land District (hereinafter referred to as "Lot 255").

2. By a Memorandum of Endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L.2396/66 of 23.6.1966, an access road of uniform width of 16 feet is registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District (hereinafter referred to as "the said Registered Easement").

3. The Plaintiffs and their predecessors in title of Lot 255 have for a period of 48 years and more next preceding the commencement of this action enjoyed as of right and without interruption of the said Registered Easement for the purpose of passing by themselves, their servants and licensees on foot, motor vehicles, and other vehicles at all times and for all purposes.

4. The Plaintiffs will further say that the Registered Easement right of way leading from Lot 255 over Lot 254 to Green Road is necessary to enable to the Plaintiffs to have access to and from Lot 255 as there is no other access road leading to the Plaintiffs' Lot 255.

5. The Defendant is the registered proprietor of Lot 254 Section 18 Kuching Town Land District (hereinafter referred to as "Lot 254"), through and over which lands the said Registered Easement runs.

6. Sometime in the month of June 2014, the Defendant wrongfully constructed a concrete base fence on the said Registered Easement, in exercise of a pretended right causing the width of the said access road to be less than 16 feet and thereby preventing the Plaintiffs from using the said Registered Easement.

Wherefore the Plaintiffs claim against the Defendant for:

(i) A declaration that the Defendant is not entitled to build or cause to build any buildings or other erections upon an access road of an uniform width of 16 feet on Lot 254 Section 18 Kuching Land Town District, a registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Land Town District *vide* Memorandum of Endorsement of Conditions of Survey Plan approved under the Land (Control of Subdivision) Ordinance No. L2396/66 of 23.06.1966;

(ii) That the Defendant do remove the concrete base fence constructed on the registered easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District;

(iii) Damages to be assessed by the Honourable Court;

(iv) Costs; and

(v) Such other further and other relief as the Honourable Court deems just and fit.

[22] The pertinent part of the third defendant's defence and counterclaim is set forth below:

…

5. The Defendant will further say that since moving into No. 155, she had been and still is aware of the concrete driveway at the side of No. 155, leading from the gate of No. 155A to Green Road ("said driveway") and that the width of the said driveway, as far as she can remember, had always been the same and there had been and still is a fence surrounding No. 155, (hereinafter referred to "No. 155 fence") which also runs on the boundary alongside the said driveway.

6. The No. 155 fence was originally a chain-link fence and sometime in the previous year, there was a break-in, presumably by unknown burglars and the chain-link fence was damaged. For safety, the Defendant, was constrained to repair and re-construct the No. 155 fence. Works on the new No. 155 fence to replace the old chain-link fence started sometime on or about December, 2013 on the same boundary line as the old chain-link fence, save that the new fence was constructed with more sturdy material and design comprising a concrete base going upwards to a height of up to about 2 feet and vertical iron rods of about 6 feet length also going vertically upwards along the same boundary line. The said driveway remained untouched and/or unaffected by the No. 155 fence at all material times. The south side of the No. 155 fence runs parallel with said driveway and reconstruction of that part of the fence took place from about December 2013 to about January 2014, that is, shortly before the Chinese New Year then. Works on all the new No. 155 fence continued thereafter and was completed sometime in June, 2014, throughout which time, the Plaintiffs never complained nor tried to put a stop on the said works ...

10. The Defendant denies any wrongful construction of the new No. 155 fence as alleged in paragraph 6 of the Plaintiffs' Statement of Claim and the said driveway used by the Plaintiffs over the easement was never reduced in width nor affected in anyway whatsoever by the construction of the new No. 155 fence. At all material times, the No. 155 fence remain along the same boundary as the fence line upon which the old chain-link fence was built from the time the Defendant acquired No. 155 ...

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13. In any case, even if the actual width of the said driveway is less than the supposed width of 16 feet as stated in the Memorandum registered with the Land Registry, the Plaintiffs are estopped from claiming that they have been prevented or hindered from using the easement as:

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(i) The Plaintiffs and/or their predecessors at all material times had been using the said driveway in the way it had been constructed, whether by themselves, their predecessors or the original developers, as it has been throughout the time since the creation of the easement affecting No. 155 and No. 155 A; and/or

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(ii) The Plaintiffs and/or their predecessors had never complained about the width of the said driveway and/or in any case, the Defendant were never aware about any problems or discrepancies with regards to the width of the said driveway when they first acquired No. 155 sometime in 1991 and the Defendant and the Plaintiffs (or their predecessors in title) had all material times accepted the said driveway as the easement referred to in the titles to No. 155 and No. 155A; and/or

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(iii) The Plaintiffs never raised any complaints nor take any step to stop the Defendant from constructing the new No. 155A fence even though they were passing by and using said driveway throughout the time of the construction and by their silence had allowed the Defendant to continue in the construction at the Defendant's costs and expense; and/or

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(iv) The new No. 155A fence is constructed on the Defendant's own property and does not in any way interfere with the Plaintiffs' use of the said driveway which had always been accepted by all parties as the easement provided by No. 155 for the residents of No. 155A.

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14. Alternatively, even if the Plaintiffs had any right (which is denied), the Plaintiffs and/or their predecessors, had by their own conduct, waived any such right and/or it is now too late for them to backtrack and complain about the width of the said driveway. The Defendant would also highlight the fact that the width of the said driveway is aligned with the gate of No. 155A. The Defendant verily believes that the said driveway was constructed either by the developer in the course of the development of No. 155 and No. 155A and the creation of the easement affecting the two property, or otherwise was constructed by the owners of No. 155A themselves and therefore by their own action, the Plaintiffs and/or their predecessors have waived whatever rights they might have to complain about the width of the said driveway which in effect is the same assessment …

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Defendant's Counterclaim

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18. The Defendant would also say that circumstances since the development of No. 155 and No. 155 A have changed and the easement over her property is no longer necessary as there is now another access road (namely, Cooke's Drive) that leads to No. 155A from Green Road.

19. The Defendant verily believes the access road to No. 155A should be replaced by Cooke's Drive as it has recently come to the Defendant's attention that public works relating to the implementation of water treatment/drainage and/or sewage system apparently was connected to No. 155A from the manhole at Green Road through/under Cooke's Drive and not the said driveway. Therefore, it is the Defendant's intention to apply for the easement registered against No. 155 to be cancelled as it is no longer necessary, alternatively for rectification of that registered instrument to reflect the actual width of the said driveway ....

21. The Defendant therefore counterclaims against the Plaintiffs for:

    (i) A declaration that the Defendant is entitled to apply to the relevant authority for the cancellation of the easement over No. 155 (Lot 254), alternatively, for the Defendant to apply for rectification of the easement to reflect the width of the road referred to therein to match the actual width of the said driveway; (The Plaintiff's Lot 255 is No. 155A and the Defendant's Lot 254 is No. 155);

    (ii) A declaration that the Defendant is entitled to maintain the new No. 155 fence;

    (iii) A declaration that the Plaintiff shall be responsible for or shall be restrained from allowing waste material to escape into the Defendant's property;

    (iv) Costs and damages, including exemplary damages to be assessed by the Honourable Court, be paid by the Plaintiff to the Defendant; and

    (v) Such other relief as the Honourable Court deem fit and just.

[23] The High Court dismissed the plaintiffs' claim.

[24] As for the third defendant's counterclaim, the High Court dismissed the counterclaim save for the grant of the second declaration sought, that the third defendant was entitled to maintain the new concrete-base fence.

[25] Essentially, the learned High Court Judge took the view that the plaintiffs' and their predecessors in title had waived their rights to the part of the "easement right of way" which did not form the access road:

In the midst of the trial, on 7.9.2015 @ 10.30 a.m. the parties, their counsels and I went for a site visit where measurements were taken of the gate to the plaintiffs' house and width of the access road. There are no two ways about it – the width of the access road is definitely less than 16 feet. In fact at the point alongside the access road where an electricity pole was erected it was less than 10 feet even. There is also a small concrete drain running alongside the access road which is obviously unused as the opening where effluents ought to be discharged is covered with concrete. An inkling of what this access road and the other features that I just described look like can be seen in the photographs tendered at the trial – that of the plaintiffs' which is at page 2 of Exhibit P3 (the plaintiffs' Supplementary Bundle of Documents) and that of the defendant marked as 5(A), 5(F), 9(A) and 9(B) of Exhibit D2 (the Defendant's Supplementary Bundle of Documents). What can be seen from these photographic evidences and this is confirmed by a private land surveyor engaged by the plaintiffs *ie*, Mr. Patrick Yii Sze Heng (PW2) and by Mr. Lim Guan Sin (PW3), the 1st plaintiff's husband, is that the width of the plaintiffs' gate is the same as that of the driveway. That gate and the driveway agreed PW3 in his cross-examination were the same ones, constructed in 1968. I could also clearly see for myself that the grass growing along the cracks of the cement screed right in front of the gate was also totally aligned with the gate and this can also be seen just as clearly in the 1st plaintiff's own photographic evidence at page 2 of Exhibit P3. What the alignment proves is that the size of the gate has always been the same since its construction all that 48 years ago. The width of that gate, when measured at the scene is 10 feet 10 inches although PW3 in his evidence said it is 9 feet 4 inches and since he drove a Mercedes car which is about 8 feet in width, it was difficult for him to drive through the access road, he said in his cross-examination by Ms. Chan Siew Yan for the defendant. When re-examined by Mr. Chong Siew Chiang for the plaintiffs, the witness said after construction of the new fence by the defendant, his Mercedes could not go through the driveway. He further said that the concrete base for the new fence is 8 3/4 inches whereas that previously for the chain-link fencing was only 3 inches – a difference of 5 3/4 inches. In fact the measurement taken during the visit shows that the concrete base for the new fence was 9 inches in width but 6 inches of it was in the defendant's land and only 3 inches of it on the driveway. In other words, the said base was wider inside the defendant's own land than it is on the driveway …

With respect, galvanising into action by litigating their right to a 16 feet access road after living with it for almost half a century is obviously not a solution for the plaintiffs are estopped by their own conduct – the conduct being waiver and delay to do so. In other words, their right to that 16 feet driveway has lapsed by effluxion of time. In drawing this conclusion I am aware that the defendant have only pleaded estoppel and waiver as a defence but it does not stop me from also construing, adversely against the plaintiffs their indolent attitude towards the right given to them by that 1966 memorandum of a 16 feet right of way for I

do not need a pleaded fact to move me to apply the often quoted principle in law that the court will not assist an indolent plaintiff who I may add was content to sleep on his rights and in this case by not just a few years but for almost half a century.

[26] Although the learned High Court Judge did not grant the first declaration sought by the third defendant (that the third defendant was entitled to apply to the relevant authority for the cancellation of the easement right of way (on the grounds there was now an alternative access)), the learned High Court Judge made clear the third defendant was so entitled to apply and that the declaration was not necessary:

The defendant called one Vincent Liew Yun Khan (DW3) as her 3rd witness. He was at that time an engineer with Jurutera Jasa Sdn Bhd *cum* Designer & Project Co-ordinator for the Kuching's centralised Sewage System. According to him and the drawing of the system exhibited to his witness statement, the sewage of the plaintiffs' house is drained into and is connected to the main sewage line at Persiaran Cooke or Cooke's Drive, not Green Road. This evidence of his is of course authoritative and unchallenged and it brings me to the counterclaim of the defendant which at paragraph 18 thereof pleaded that the access road is no longer necessary as the plaintiffs can access their land *via* Cooke's Drive.

At the same visit on 7.9.2015, we also went up to Cooke's Drive which opens up to the backyard of the plaintiffs' house. Meaning to say it is accessible through the said Drive if an opening is made to the back fence behind the plaintiffs' house. Besides Cooke Drive is also a small playground and a small car park. Photographs of the back of the plaintiffs' house and part of that car park can be seen in photographs 6(A) and (B) of Exhibit D2. What can also be seen in both photographs, though partly hidden by overgrown bushes but which I could clearly see during the visit is a DBKU meter box which according to both PW3 and PW4 would hinder any access to their house from Cooke's Drive. With respect, I do not see that is so – from the two photographs also it can be seen that such an access is possible and which the plaintiffs would have to do in the event that the defendant succeeds in extinguishing the easement granted to them. That power of extinguishment lies with the one who granted it in the first place *ie*, the Superintendent of Lands and Surveys Kuching. The plaintiffs' first witness, the Registrar of Lands and Surveys herself *ie*, Puan Dayang Rodziah binti Awang Shuib (PW1) agreed that the easement can be extinguished if all parties agree to it and if there is an alternative public access to it. Clearly therefore the defendant is at liberty to make the necessary application before the said officer and she does not need me to make a declaration, as prayed in prayer 21(i) of her counterclaim, that she can do so. On this issue I was referred, by Ms. Chan Siew Yan to the case of the Court of Appeal in the *State Government of Sarawak & Others v. Teo Soo Chuan* [2014] 5 CLJ 68; [2014] 4 MLJ 114 which appeal incidentally originated from my decision on the extinguishment of an easement. The Court of Appeal overturned my

A decision to extinguish the easement in the said case but said at paragraph 14 of the judgment held that the court can make an order of determination or extinguishment of an easement provided all necessary and interested parties are before the court. However, I do not see much relevance of the *ratio* in the cited case to the said declaratory prayer sought by the defendant because the right to make an application to the said B officer of Lands and Surveys Department is inherent in the servient tenement *ie*, the defendant but whether the application will meet with success is another matter altogether. Without any intention to goad the parties to a further legal dispute, I would just have to add that if their application fails, the defendant can, going by the cited case as well as another one cited by Ms. Chan Siew Yan, *ie*, *Taat Yik Plantations Sdn Bhd* C *v. Pentadbir Tanah Hilir Perak & Others* [2001] 3 CLJ 916; [2001] 5 MLJ 736 always file their own claim against the said officer or the relevant government agency and even the plaintiffs for the easement to be extinguished although I sincerely hope that in the spirit of neighbourliness, or what is left of it, the defendant would not have to do so. D

[27] The plaintiffs appealed to the Court of Appeal.

[28] The Court of Appeal heard the appeal in October 2016 and allowed the appeal (*Teo Sui Chin & Ors v. Lim Siok Luan* [2019] 10 CLJ 313; [2020] 1 MLJ 670):

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[18] … It must be emphasised that both parties, including the learned judge, in the present appeal clearly and categorically agreed that the concerned registered easement is still subsisting and enforceable. Nevertheless, the learned judge found, in the circumstances as highlighted also by both parties, that the plaintiffs are estopped, due to F waiver or effluxion of time, from proceeding to claim the full terms of the easement due to their indolent attitude to pursue such rights. They can only or must only be contented with the driveway, which the court has clearly found to be very much reduced from what had been statutorily granted, as it was earlier constructed and used by them or their predecessors. We are of the view that the learned judge has erred in law G in holding as such. Apart from what we have said about the determination of easement by effluxion of time, and in the absence of any written contract or deed to the contrary, there is no provision in the Sarawak Land Code providing for the release or abandonment of only part of the land (see *Tapling v. Jones* [1865] 12 CB (NS) 826. In effect that is exactly the view of the learned trial judge that there was such a partial release H or abandonment of the easement by acquiescing to the non-user of the full right as granted statutorily. …

[19] What is stark clear in the present case is that no such intention was ever proved that the plaintiffs no longer require the easement or that it has not been used for such a long time. We are of the view the easement I here must mean the entire easement and not merely partial easement. In any event, even if we are wrong here, we are of the view that mere non

> user of a part of the easement due to having no exact knowledge of the terms of the easement, as we found it to be so here, does not amount to partial abandonment or release of the easement …
>
> [20] … In the same token, the defendant's contention that since the driveway was only as wide as the chain-link fence allowed for the past 48 years, the plaintiffs should be estopped from insisting a 16 feet access road now is fallacious. As we had mentioned above, this proposition clearly goes again the very source of the grant which must be adhered to strictly unless determined or extinguished according to law, which we find the defendant has failed to do in this case. The fact remains that the width of the access is very much reduced and this is starkly against the statutory grant as endorsed and registered. In the circumstances, it is not possible to estop an aggrieved party from insisting a statutory 16 feet access road even though they have knowledge of the reduced width before, when the reduction itself is in law unlawful and a contravention of the condition precedent to the title.

[29] Following the Court of Appeal's decision, the third defendant applied to the Federal Court for leave to appeal against the Court of Appeal's decision.

[30] The Court of Appeal gave its written grounds in July 2018 and the Federal Court heard the leave application thereafter in the same month and dismissed the leave application.

[31] Subsequent to the Federal Court's dismissal of the leave application, by letter dated 3 September 2018, the third defendant through her solicitors submitted an application to the Superintendent of Lands and Surveys for the extinguishment of the "easement right of way".

[32] The stated basis of the application was that there was now an alternative access to Lot 255 in the form of Cooke's Drive (Persiaran Cooke) which had been previously a private road but was now a public road.

[33] Although on the face of it the application was not copied to the plaintiffs or their solicitors, the plaintiffs came to learn of it and their solicitors wrote in to object to the application by letter dated 14 September 2018 which was copied to the third defendant's solicitors.

[34] Thereafter other letters followed, from each side, to the Department of Lands and Surveys, setting out their respective case and replying to each other's letters.

Third Defendant's Solicitors	Plaintiffs Solicitors
3 September 2018	14 September 2018
26 September 2018	8 October 2018
12 October 2018	12 November 2018

[35] On 11 July 2019, the first defendant Registrar issued the requisite notice to the plaintiffs' solicitors under s. 141 of the Sarawak Land Code which section reads:

> **Removal of easement**
>
> 141. Where an easement has been determined or extinguished, the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto: Provided that, unless the determination or extinguishment was by effluxion of time or merger, the Registrar before making the entry in the Register shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the *Gazette*.

[36] By letter dated 6 August 2019, the plaintiffs' solicitors wrote to the first defendant Registrar, once again setting forth their objection and the case of the plaintiffs.

[37] In addition to sending the s. 141 notice to the plaintiffs' solicitors and the third defendant's solicitors, the Lands and Surveys Department also had the notice published in the State *Gazette* dated 5 September 2019.

[38] Thereafter, a decision must have been made by the first defendant Registrar to proceed with the extinguishment and the "easement right of way" was removed from the titles of Lots 254 and 255.

[39] However, it appears the Lands and Surveys Department did not call or write to the plaintiffs' solicitors to inform them of the decision to proceed with the extinguishment.

[40] As mentioned earlier, the first defendant Registrar has filed an affidavit in these proceedings explaining the extinguishment of the "easement right of way" and the pertinent part of the affidavit is reproduced below:

> 6. The advocate for the 3rd Defendant has written an application for extinguishment of easement on 03.09.2018 ("Exhibit SA2").
>
> 7. Upon this application, the Service Notice and a Notice pursuant to Section 141 of the Sarawak Land Code (Cap. 81) was sent to Messrs. Chong Brothers Advocates on 11.07.2019. ("Exhibit SA3"). We also confirm that we have received the letter from Chong Brothers together with their reason against the said extinguishment.
>
> 8. However, Section 34(1)(a) of the Sarawak Land Code (Cap. 81) provides that all land shall be held subject to an implied right that if the proprietor or occupier of land adjoining or in the neighbourhood who has no other reasonable means of access from his land to a public road, way, river, creek or foreshore, shall have

a right of way for all reasonable purposes over such land. Section 34(4) provides that it is under the authority of Superintendent to grant the right of way.

9. Section 141 of the Sarawak Land Code (Cap. 81) provides where an easement has been determined or extinguished the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register.

10. Dewan Bandaraya Kuching Utara ("DBKU") has confirmed *vide* its letter dated 12.11.2014 ("Exhibit SA4") that Persiaran Cooke (Cooke's Drive) is a public access road under the jurisdiction of DBKU and listed as the road under DBKU.

11. Since there is a public road provided by the authority, therefore the easement No. L.2396/1966 is no longer required under Section 34 of the Sarawak Land Code. Therefore, I wish to say that as a Registrar merely acting on the authority vested upon me by virtue of Section 141, after taking into account all the relevant proof and evidence, together with all the relevant provisions of the law, and that I am satisfied that the easement is appropriate to be extinguished, I have exercised the duty to carry out the extinguishment of easement to be registered.

Issue No. 1: The Correct Mode Of Action

[41] Counsel for the third defendant and counsel for the first and second defendants submitted that the instant originating summons was flawed in that the plaintiffs should have applied for judicial review of the Registrar's decision, instead of filing this appeal by way of originating summons.

[42] The court was hard-pressed to see the merit of this submission.

[43] The instant originating summons was stated to be filed under ss. 203 to 206 of the Sarawak Land Code which read:

203. Appeal from decision of Registrar

If the Registrar refuses to perform any act or duty which he is hereby required or empowered to perform under this code, or if the proprietor or other claimant to any land, estate or interest is dissatisfied with the direction or decision of the Registrar in respect of any matter or thing under this code, the person deeming himself aggrieved may require the Registrar to set forth in writing the grounds of his refusal, direction or decision.

204. Notice to Registrar of appeal

Any such person may, if he thinks fit, call upon the Registrar to appear before the High Court to substantiate and uphold the grounds of such refusal, direction or decision by a notice served upon the Registrar fourteen clear days, at least, before the date appointed for the hearing.

205(1). Hearing of appeal

Upon the hearing by the High Court of any proceeding under sections 203 and 204, the Court shall make such order in the premises as the circumstances of the case may require, and such order shall be binding upon the Registrar.

205(2). Expenses of appeal

All expenses attendant upon any such proceeding shall be borne and paid by the person initiating the proceeding unless the Court orders that the same be paid out of public funds.

206. Procedure

In the conduct of actions and proceedings under this Part in any court, the same rules shall apply, and there shall be the same rights of appeal, as are in force or exist for the time being in respect of civil proceedings in the same court.

[44] The above sections of the Sarawak Land Code clearly provide for any proprietors or other claimant to any land, estate or interest dissatisfied with or aggrieved by a decision of the Registrar, to appeal the decision to the High Court.

[45] The plaintiffs being dissatisfied with the decision of the Registrar in respect of the extinguishment of the "easement right of way", were entitled to invoke these provisions to file the instant appeal.

[46] As for the mode of commencement, O. 55A r. 1(1) of the Rules of Court 2012 provides that:

Appeals to the High Court under written law

1(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by way of an originating summons setting out the grounds of the appeal and supported by an affidavit, and if the Court so directs at the hearing of the appeal, by way of oral evidence.

[47] Putting aside ss. 203 to 206 of the Sarawak Land Code, the court was also of the view that the instant dispute was essentially a matter under private law, *albeit* concerning a public authority.

[48] In the leading case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, the Federal Court said as follows:

We observe that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of

> O. 53 RHC. If there is a mixture of public and private law then the Court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the Court's process. But if the matter is under private law, though concerning a public authority, the mode to commence action under O. 53 RHC is not suitable.

Issue No. 2: Whether The Plaintiffs Were Nevertheless Out Of Time

[49] Order 55A r. 1(3) of the Rules of Court 2012 provides that:

> (3) Unless otherwise provided by any written law, such appeal must be filed in the manner prescribed in paragraph (2) within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date.

[50] Learned counsel for the defendants contended that even if O. 55A were applicable, the plaintiffs were out of time.

[51] Learned counsel submitted that the decision of the Registrar was effected by November 2019, but the instant originating summons was only filed on 27 February 2020.

[52] Following the filing by the third defendant of the application to extinguish the easement in September 2018, both sides had written several letters to the Department of Lands and Surveys, as set out earlier.

[53] In July 2019, the Lands and Surveys Department sent a copy of the notice under s. 141 of the Sarawak Land Code, addressed to both the plaintiffs and the third defendant.

[54] The plaintiffs' solicitors replied by letter dated 6 August 2019 as described earlier.

[55] At some stage, the Lands and Surveys Department must have made the assessment or decision that the plaintiffs had failed to show cause and the Department proceeded with the extinguishment.

[56] The court was of the view to constitute notification to the plaintiffs, the Department would have to inform the plaintiffs of the decision, whether orally or in writing.

[57] There was no evidence of the plaintiffs being informed of the decision whether orally or in writing and neither did the defendants contend otherwise.

[58] Neither was it seriously disputed the plaintiffs only came to know of the extinguishment on 21 February 2020, following a letter from the third defendant's solicitors dated 14 February 2020.

[59] The instant originating summons was filed on 27 February 2020, six days later, and therefore was well within the statutory one-month deadline.

Issue No. 3: Whether The Plaintiffs Had To Request For Written Grounds First Under Section 203 Before Filing The Appeal

[60] Learned counsel for the defendants further submitted that under ss. 203 and 204 of the Sarawak Land Code, a person intending to appeal a decision of the Registrar must first require or request the Registrar for the written grounds of decision, before filing the appeal.

[61] It was not disputed that the plaintiffs had not done so prior to filing the instant originating summons.

[62] Sections 203 and 204 of the Sarawak Land Code have been quoted earlier but for ease of reference are reproduced below:

> **203. Appeal from decision of Registrar**
>
> If the Registrar refuses to perform any act or duty which he is hereby required or empowered to perform under this code, or if the proprietor or other claimant to any land, estate or interest is dissatisfied with the direction or decision of the Registrar in respect of any matter or thing under this code, the person deeming himself aggrieved may require the Registrar to set forth in writing the grounds of his refusal, direction or decision.
>
> **204. Notice to Registrar of appeal**
>
> Any such person may, if he thinks fit, call upon the Registrar to appear before the High Court to substantiate and uphold the grounds of such refusal, direction or decision by a notice served upon the Registrar fourteen clear days, at least, before the date appointed for the hearing.

[63] With respect, the court could not agree with the submission that a request for written grounds must have been made before an appeal can be filed or that a failure to make such request would render the appeal fatally defective.

[64] The operative word in s. 203 is "may", which means it is elective and not mandatory.

[65] Secondly, s. 204 did not say "written grounds" or "grounds in writing" but merely "grounds".

[66] More importantly, neither ss. 203 nor 204 whether construed separately or read together, contains any requirement that a person appealing must first request for written grounds first, before filing an appeal.

Issue No 4: Whether The Registrar Erred In The Extinguishment Of The "Easement Right Of Way"

[67] The interest in question on the titles was described as an "easement right of way".

[68] In *The State Government Of Sarawak & Ors v. Teo Soo Chuan* [2014] 5 CLJ 68; [2014] 4 MLJ 114, the Court of Appeal said:

> [24] We find no difficulty with the meaning of 'easement' in the *Concise Oxford Dictionary* as '(Law) right of way or similar right over another ground'. Nor do we have any difficulty with the definition of easement in *West's Encyclopaedia of American Law* (2nd Ed) that:
>
> > A right of use over property of another. Traditionally the permitted kinds of uses were limited, the most important being 'rights of way' and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant) rather than for the benefit of a specific individual (easement in gross).

[69] Not all rights of way are easements; a private right of way is an easement, while a public right of way would not fall under the definition of an easement, as was made clear by the Supreme Court in *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160; [1990] 3 MLJ 369:

> A right of way may be described as a right of passing over someone else's property. The right carries with it no interest whatsoever in the soil of the land, which remains the property of the owner, although as was said by Lord Selborne LC in *Goodson v. Richardson* (1874) 9 Ch App 221 'he cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it …'. The owner of the land over which the way passes is entitled, however, to prevent its surface being used in any manner or for any purpose other than that of passing and repassing.
>
> Rights of way are either public or private. Easement has been loosely and inaccurately used to define a public right of way. Strictly speaking, it is more appropriate to use it in respect of private right, which is an 'easement' or incorporeal right in the nature of a privilege which has been created by grant or by reservation or by prescription. A public right of way lacks the essential requirement of a dominant tenement for the benefit of which the right is exercisable.
>
> Any public right of way of any width may be said to be a highway. The grant of a right of way is merely a right of passing and repassing (whether it be of footway, path, carriageway or otherwise). The public acquires by dedication no right of property in the soil. The owner of the soil, after dedication, retains all his rights in the soil and may exercise those rights just as he pleases so long as he does not interfere with the public right of passing and repassing along the surface. The owner still retains very

A important advantages. See *R v. Pratt* (1885) 4 E & B 860; 119 ER 319; *Harrison v. Duke of Rutland* [1893] 1 QB 142; and *Hickman v. Maisey* [1900] 1 QB 752.

[70] The distinction between a public right of way and a private right of way is also found in s. 389 of the National Land Code:

B **Characteristics of Land Administrator's rights of way**

389(1) A Land Administrator's right of way may be:

(a) a right of way created for the benefit of the State Authority or the proprietor or occupier of any alienated land (referred to in this Part as private right of way); or

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(b) a right of way created for the benefit of the public (referred to in this Part as a public right of way).

(2) A private right of way created for the benefit of the State Authority shall authorise persons acting with the express or implied consent of the

D State Authority:

(a) to pass and repass between reserved land or a forest reserve and a public terminal; or

(b) for the purpose of removing rock material from any land, to pass and repass between the land and a public terminal.

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(3) A private right of way created for the benefit of the proprietor or occupier of alienated land shall authorise the proprietor or occupier, as the case may be, and persons acting with the express or implied consent of the proprietor or occupier to pass and repass between the land and a public terminal.

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(4) A public right of way shall authorise the public to pass and repass between any specified area of land and a public terminal.

(5) (Deleted by Act A587).

[71] In the instant case, it was an easement in the form of a private right

G of way.

[72] It was an easement of necessity in that if not for the right of way, Lot 255 would be landlocked and rendered unusable.

[73] Section 34 of the Sarawak Land Code reads as follows:

H Right of way:

34(1) All land shall be held subject to an implied right:

(a) that the proprietor or occupier of land adjoining or in the neighbourhood who has no other reasonable means of access from his land to a public road, way, river, creek or foreshore;

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(b) that the holder of a licence or permit to take rock material or forest produce who has no other reasonable means of access from a public road, way, river, creek or foreshore to such rock material or forest produce; and

(c) that the holder of a mining lease or prospecting licence who has no other reasonable means of access from a public road, way, river, creek or foreshore to land over which mining or prospecting rights have been granted to him under such lease or licence, shall have a right of way for all reasonable purposes over such land and to pass and repass with or without boats or vehicles.

[Sub. Ord. No. 18/71.]

(2) If the persons concerned cannot agree among themselves to the location of the path or track which will constitute a right of way, the matter shall be referred to the Superintendent by the person or persons requiring the right of way, and the Superintendent shall have power to decide the matter.

(3) The Superintendent shall have power to declare the terms upon which a right of way shall be granted under this section and may impose such conditions as to formation and maintenance as may be considered necessary. Where the right of way is granted over an existing path or track which has been formed or maintained at the expense of the person over whose land it passes, the Superintendent may require the person to whom the right of way is granted to pay to such other person such reasonable sum as may be assessed by way of compensation.

(4) In any case where a right of way for the benefit of the proprietors or occupiers of adjoining land has been created under this section, the Superintendent may issue a right of way certificate which shall:

(a) specify the land served by the right of way and the land over which it exists;

(b) have endorsed thereon or refer to a diagram showing the land served by the right of way and the land over which it exists; and

(c) be noted on the appropriate maps and plans in the Land and Survey Office and be registered in the Register in accordance with section 112.

(5) Compensation for damage, if any, to trees or other property belonging to the person or persons through whose land a right of way is made shall be primarily assessed by mutual agreement between the parties concerned and, in the absence of agreement, the matter shall be referred to the Superintendent and the compensation assessed by him.

(6) Any person aggrieved by any decision of the Superintendent under this section may, within thirty days of being informed of such decision, appeal to the High Court and for the purpose of further appeal any decision of the High Court shall be deemed to be made in a civil proceeding.

[74] In the instant case, the "easement right of way" came about as a result of a sub-division of a parcel of land, as described earlier, under s. 10 of the Land (Control of Sub-Division) Ordinance Cap 82 which section reads:

> 10. The Director of Lands and Surveys shall, in respect of any land affected by any survey plan approved by this Ordinance and subject to the provisions of section 21, make or cause to be made in the Register kept under the Land Code, an endorsement to the effect that such land is subject to the conditions of such approved survey plan.

[75] Nothing turns on whether the "easement right of way" in the instant case was created under s. 34 of the Sarawak Land Code or s. 10 of the Land (Control of Sub-Division) Ordinance; the "easement right of way" was an easement of necessity, created for the purpose of allowing land (Lot 255) which would otherwise be landlocked, access to a public road.

[76] As an easement of necessity, the "easement right of way" would come to an end when the necessity ceases.

[77] This principle is succinctly stated in s. 41 of The Indian Easements Act, 1882:

> 41. Extinction on termination of necessity:
>
> An easement of necessity is extinguished when the necessity comes to an end.

[78] In *Lichty v. Sickels*, 149 Cal. App. 3d 696, the Court of Appeal of California had the occasion to refer to this principle:

> The court answered that the way of necessity created as a result of a partition which occurred in 1871 became appurtenant to the land, and "the facts found having shown that a way of necessity once existed, it must be presumed to continue until some fact found by the court shows that the right no longer exists ... The way, having been created by the necessity for its use, cannot be extinguished so long as the necessity exists. (*id*, at p. 369).
>
> In a similar vein is the following statement of the rule found in 28 Corpus Juris Secundum, Easements, section 54, paragraph b, at pages 718 and 719: While ordinarily a right of way of necessity continues until some other lawful way has been acquired, and cannot be extinguished so long as the necessity continues to exist, nevertheless, a way of necessity ceases as soon as the necessity to use it ceases. Accordingly, a right of way of necessity ceases when the owner of the way acquires a new means of access to his estate, as where he acquires other property of his own over which he may pass, or where a public way is laid out which affords access to his premises; and the fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases to be absolutely necessary.

[79] Here in Malaysia, in *State Government Of Sarawak v. Teo Soo Chuan*, *supra*, the Court of Appeal had to construe an easement right of way that came about from a grant couched in the following terms: A

> [32] The deeds signified that the respondent's father as grantor had agreed with the grantees to the grant of right of way in the nature of an easement: B
>
> > the Grantor Doth Hereby TRANSFER AND GRANT unto the Grantees and their successors in titles for the time being of the dominant tenement or any part thereof in the nature of an easement thereto the full and free right and liberty for them and their tenants and agents servants workmen licences and invitees in common with the Grantor and all other persons lawfully using the same from time to time and at all times by day or night to pass and repass with or without horses or domestic animals of any kind and/or with or without carriages vehicles or implements of any kind over and along all that parcel of land coloured yellow in the plan and therein marked 'Right of Way' for the purpose of giving access to the dominant tenement from the public road … C D

[80] The terms of the grant did not specify the length of time or duration of the easement right of way, as the Court of Appeal noted:

> [39] Examination of the deeds show no provision limiting the right of way to any part of Lot 27. Or to any length of time. The shape of Lot 27, and its dimensions and location in relation to the dominant tenements show the entire Lot 27 provided access for the dominant tenements. Termination or cessation of the easement would mean that the dominant tenements would cease to have access to the main road. There is no evidence placed before the court that the dominant tenements have other access, and indeed the case for the respondent that the appellants failed to provide road access to the subdivided lots under the dominant tenements means it is the respondent's case that they do not have alternative access. E F

[81] Nevertheless, the Court of Appeal construed the easement right of way to only last "for as long as the dominant tenements needs the right of way": G

> [42] We conclude, therefore, that:
>
> (a) the right of way was granted over the whole of Lot 27;
>
> (b) it was granted for as long as the dominant tenements needs the right of way; and H
>
> (c) the grantor reserved for himself and all other persons lawfully using the same from time to time the right to use Lot 27 as a right of way.

[82] In *Chin & Sons (1955) Sdn Bhd & Ors v. William Crocket & Ors* [2000] 1 LNS 3; [2000] 5 MLJ 497, the High Court also had to construe the terms of an "easement right of way", on the question whether the easement was intended for perpetuity or until an alternative access came into existence: I

A The terms 'easement' and 'right of way' had been used by the instrument creating the same. That instrument was executed in 1952 before the coming into force of the Sarawak Land Code but its registration was maintained and continued under the Land Code. The first plaintiff acquired Lot 30 in 1989 with an express provision that it is subject to the registered easement. The first plaintiff's estate or interest in Lot 30 is
B under s. 132(1)(f), subject to the easement. The terms 'easement' or 'right of way' are not defined in the Land Code nor by its predecessor the Land Ordinance. It is common ground that a right of way is a form of easement. The meaning of 'right of way' can be gathered from s. 13 of the Land Ordinance which has employed the term, *viz*: [*504]

C (1) All land shall be held subject to an implied right of way for owners or occupiers of land adjoining or in the neighbourhood to go to and from their land over Crown land or over land of adjoining owners, if there is no other reasonable means of ingress and egress, and also a right of way, if necessary, for carts or other vehicles to pass and re-pass for all reasonable purposes.

D (2) If the owners concerned cannot agree among themselves to the location of the path or tract which will constitute a right of way the matter shall be referred to the Superintendent by the person or persons requiring the right of way, and if the right of way is agreed upon or granted by the Superintendent and dedicated as a public or
E private right of way, the right of way so dedicated shall where possible be referred to or delineated in all the grants or other documents of title affected by the right of way and noted accordingly in the Land Office.

(3) The right to claim a right of way can only be resorted to by owners or occupiers of land who have no other reasonable means of ingress
F and egress other than over the land of adjoining owners, and primarily to and from a public road or way, river, creek or foreshore.

(4) Compensation for damage, if any, to trees or other property belonging to the person or persons through whose land a right of way is made, shall be primarily assessed by and between the parties
G concerned and in the absence of agreement shall be referred to and assessed by the Superintendent.

Since the instrument must have been the result of negotiations against the background of the Land Ordinance I can suppose that they have taken that law into consideration when the instrument was created
H (*Lewison on Interpretation of Contracts* at p. 56, para 3.04). Thus, it is clear to me that when the instrument was created it was meant to grant a right of way as envisaged by s. 13 of the Land Ordinance. That right of way was granted because the dominant properties were landlocked. By that consideration alone, the instrument can be taken to exist for as long as there is no alternative access. However, it is open to the parties to grant
I a right of way in perpetuity and this is recognised by Form G(1) of the

> Land Code. This brings me to the question of whether the easement was intended for perpetuity or till an alternative access comes into existence. For this purpose it is the instrument that we should look at primarily to find the answer and to construe it against the legal background then existing. Unfortunately, the instrument is completely silent as to the duration of the right of way. However, since the matter of the right of way was covered by s. 13 of the Land Ordinance it is relevant to take that law into account. It is clear from that provision that the then owner of Lot 30 had no option but to allow the owners of Lots 207 and 206 to pass and repass Lot 30 since it is subject to that implied right of neighbouring land-locked owners given under the Land Ordinance. Since the instrument did not express the right of way to be forever it is inconceivable that the owner of Lot 30 would have intended it to be so when the Land Ordinance only requires an obligation to provide the right of way when there is no alternative access. It is only possible where there is valuable consideration or where it is granted for love and affection but there is no evidence of that. Unfortunately, there is also no term in the [*505] instrument to say that the right of way shall cease when there is other means of ingress or egress. It is also not the case of the plaintiffs that there should be a term implied in the instrument that the right of way shall cease and be extinguished upon the coming into existence of an alternative access. If the case had proceeded on that basis that such term should be implied in the instrument, I would, on the existing evidence, find it difficult not to accede to such argument. I have to leave matter as it is since the case was not argued on that line.

[83] Thus, for an easement right of way of necessity, the easement right of way will come to an end when the necessity ceases, even if the terms of the easement right of way contain no express provision that the easement right of way was only for so long as the necessity persists.

Issue No 5: Whether There Was An Alternative Access To Lot 255 In The Form Of Cooke's Drive (Persiaran Cooke)

[84] As mentioned earlier, the basis of the application to the Registrar by the third defendant under cover of her solicitors' letter dated 3 September 2018 for the extinguishment of the "easement right of way" was that there was now alternative access to Lot 255 in the form of Cooke's Drive.

[85] It was stated in the application that Cooke's Drive had previously been a private road but was now a public road.

[86] In the first letter written by the plaintiffs' solicitors to the Land Office dated 14 September 2018 in response to the application, which letter was copied to the third defendant's solicitors, there was no statement in the letter disputing those averments in the application and in particular that:

A (i) Cooke's Drive had previously been a private road but was now a public road;

(ii) that Lot 255 could now be accessed through Cooke's Drive.

[87] Instead, the plaintiffs' solicitors averred in the letter dated B 14 September 2018 that the application "was in effect an attempt to circumvent the legal effect of the order of the Court of Appeal" and that "to allow the applicant's application would be a blatant disregard to the said order amounting to an act of contempt of the court order".

[88] The plaintiffs' solicitors next wrote to the Lands and Surveys C Department by letter dated 8 October 2018 and once again the plaintiffs' solicitors did not dispute the averments in the application that Lot 255 could now be accessed through Cooke's Drive or that Cooke's Drive had been previously a private road but was now public.

[89] Instead in this letter, the plaintiffs' solicitors took the position that two D conditions need to be met, that in addition to alternative public access, both sides must agree to the extinguishment.

[90] The plaintiffs' solicitors thereafter wrote to the Lands and Surveys Department by letter dated 12 November 2018.

E **[91]** Again, there was no averments in the letter disputing that there was now alternative public access to Lot 255.

[92] It was only after the first defendant Registrar had issued the notice dated 11 July 2019, under s. 141 of the Sarawak Land Code, that the plaintiffs' solicitors in their lengthy letter dated 6 August 2019 made a one F sentence averment that "It is clear that there is no other alternative route or means of access to the plaintiffs' land Lot 255 other than the existing registered easement right of way".

[93] Even then, the plaintiffs' solicitors did not address the averments in the third defendant's application regarding Cooke's Drive.

G

[94] Looking at the subdivision plan referred to earlier, it can clearly be seen Lot 255 can be accessed through Cooke's Drive.

[95] The learned High Court Judge in the previous litigation made a site visit and noted in her judgment that Lot 255 could be accessed through H Cooke's Drive:

> The defendant called one Vincent Liew Yun Khan ('DW3') as her third witness. He was at that time an engineer with Jurutera Jasa Sdn Bhd *cum* Designer & Project Co-ordinator for the Kuching's centralised sewage system. According to him and the drawing of the system exhibited to his I witness statement, the sewage of the plaintiffs' house is drained into and is connected to the main sewage line at Persiaran Cooke or Cooke's

> Drive, not Green Road. This evidence of his is of course authoritative and unchallenged and it brings me to the counterclaim of the defendant which at para 18 thereof pleaded that the access road is no longer necessary as the plaintiffs can access their land *via* Cooke's Drive.
>
> At the same visit on 7 September 2015, we also went up to Cooke's Drive which opens up to the backyard of the plaintiffs' house. Meaning to say it is accessible through the said drive if an opening is made to the back fence behind the plaintiffs' house. Besides Cooke Drive is also a small playground and a small car park. Photographs of the back of the plaintiffs' house and part of that car park can be seen in photographs 6(A) and (B) of exh D2. What can also be seen in both photographs, though partly hidden by overgrown bushes but which I could clearly see during the visit is a DBKU meter box which according to both PW3 and PW4 would hinder any access to their house from Cooke's Drive. With respect, I do not see that is so – from the two photographs also it can be seen that such an access is possible and which the plaintiffs would have to do in the event that the defendant succeeds in extinguishing the easement granted to them …

[96] From the foregoing, it was clear to the court that Lot 255 could be accessed through Cooke's Drive.

Issue No 6: Whether The Registrar Had To "Hold An Inquiry" Under Section 141 Before Effecting The Extinguishment

[97] Learned counsel for the plaintiffs submitted the Registrar had to hold an inquiry before effecting the extinguishment, that no inquiry was held and as such the extinguishment was improper.

[98] The court saw no merit in this submission.

[99] First, s. 141 of the Sarawak Land Code does not contain any requirement that the Registrar must hold a formal inquiry.

[100] Second, it could not be argued that the plaintiffs had not been given an opportunity to be heard, in respect of the application for extinguishment.

[101] The plaintiffs' solicitors had a copy of the application and as detailed earlier, the plaintiffs' solicitors wrote several letters to the Lands and Surveys Department, setting out the plaintiffs' case and in rebuttal to the letters written by the third defendant's solicitors.

[102] The court would also note these arguments were never raised in the plaintiffs' solicitors' letters to the Lands and Surveys Department in 2018 and 2019.

[103] If there were any validity to these arguments, these arguments should have been raised at the outset and not only after the Registrar had ruled against the plaintiffs.

[104] Learned counsel further submitted that s. 141 of the Sarawak Land Code was based on s. 70 of the Land Transfer Act 1952 of New Zealand and learned counsel referred the court to certain commentaries and rulings on this s. 70.

[105] The court was of the view that s. 70 was of no assistance to the case of the plaintiffs, as New Zealand had a different legislative scheme in respect of the removal of easements.

[106] In New Zealand, in addition to s. 70 of the Land Transfer Act 1952, which would be an application to the Registrar, under s. 127 of the Property Law Act 1952, an applicant may apply to the court to remove an easement.

[107] This legislative scheme then operative in New Zealand before the original s. 70 was amended, was summarised in a 1971 working paper referred to by learned counsel for the plaintiffs himself:

> 2. **Existing law in New Zealand**
>
> Easements may be extinguished in one of the following ways:
>
> (a) By merger;
>
> (b) By release;
>
> (c) By satisfying the Registrar under s. 70 of the Land Transfer Act 1952 that the easement has been determined or extinguished; or
>
> (d) By order of the Supreme Court under s. 127 of the Property Law Act 1952 …
>
> (c) **Removal of easements by the District Land Registrar**
>
> Under s. 70 of the Land Transfer Act 1952, an easement may be removed from the Land Transfer Register upon proof to the satisfaction of the Registrar that it has been determined or extinguished. Except where the determination or extinguishment was by effluxion of time, the Registrar must, before making the entry in the Register, either give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement …
>
> (d) **Modification or extinguishment of easements by the Supreme Court**
>
> Section 127(1) of the Property Law Act 1952 provides:
>
> 1. Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied:

(a) that by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede any such user; or

(b) the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part; or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction. ...

[108] There is no provision in the Sarawak Land Code corresponding to s. 127 of the Property Law Act 1952 of New Zealand.

[109] On the argument that under s. 141 of the Sarawak Land Code, the Registrar cannot proceed if there are objections received, there is nothing in s. 141 that would support this argument.

[110] Learned counsel had referred to certain rulings in New Zealand but the court would note these rulings referred not to the original s. 70 of the Land Transfer Act 1952 but to a later version of s. 70 amended in 2002 which contained express language regarding objections.

[111] The court would further note that s. 70 has been amended again in 2017 and the 2017 amendments contain express language to the effect the Registrar can still proceed to rule even if there are objections.

[112] Under s. 141 of the Sarawak Land Code, the Registrar can proceed to make the appropriate entry upon proof to his satisfaction of the determination or extinguishment of the easement (and after proper notice to persons affected unless the determination or extinguishment was by effluxion of time or merger).

[113] The powers under s. 141 are reserved for the Registrar and this was acknowledged by the High Court in both *Chin & Sons (1995) Sdn Bhd & Ors v. William Crocket & Ors* [1997] 4 CLJ Supp 111; [1998] 5 MLJ 545 and in *Chin & Sons (1995) Sdn Bhd v. William Crocket* [2000] 1 LNS 3; [2000] 5 MLJ 497 referred to earlier.

[114] In the latter case, the High Court concluded as follows:

> The plaintiffs may, if not barred by other legal consideration, still have a way out and that is by applying to the registrar under s. 141 to have the easement extinguished on the basis of an incorporation of an implied term that the easement comes to an end where there is alternative access. This matter I have not decided since it was not canvassed before me and it would be up to the registrar to decide whether it can succeed if ever the matter can legally be laid before him again.

Issue No 7: Whether The Extinguishment Of The "Easement Right Of Way" Was In Contravention Of The Order Of The Court Of Appeal

[115] Learned counsel for the plaintiffs submitted the matter was already *'res judicata'* and that the extinguishment of the "easement right of way" was in contravention of the decision/order of the Court of Appeal.

[116] The court found no merit in this submission.

[117] First, although the High Court did not grant the declaration sought by the third defendant that she was entitled to apply to the Lands and Surveys Department for the extinguishment of the "easement right of way", the learned High Court Judge made clear the court did not do so because it was not necessary and that it was a given the third defendant was so entitled:

> [14] … Clearly therefore the defendant is at liberty to make the necessary application before the said officer and she does not need me to make a declaration, as prayed in prayer 21(i) of her counterclaim, that she can do so. On this issue I was referred, by Ms Chan Siew Yan to the case of the Court of Appeal in the *The State Government of Sarawak & Ors v. Teo Soo Chuan* [2014] 5 CLJ 68; [2014] 4 MLJ 114 which appeal incidentally originated from my decision on the extinguishment of an easement. The Court of Appeal overturned my decision to extinguish the easement in the said case but said at para 14 of the judgment held that the court can make an order of determination or extinguishment of an easement provided all necessary and interested parties are before the court. However, I do not see much relevance of the *ratio* in the cited case to the said declaratory prayer sought by the defendant because the right to make an application to the said officer of Land and Survey Department is inherent in the servient tenement ie the defendant but whether the application will meet with success is another matter altogether. Without any intention to goad the parties to a further legal dispute, I would just have to add that if their application fails, the defendant can, going by the cited case as well as another one cited by Ms Chan Siew Yan, *ie*, *Taat Yik Plantations Sdn Bhd v. Pentadbir Tanah Hilir Perak & Ors* [2001] 3 CLJ 916; [2001] 5 MLJ 736 always file their own claim against the said officer or the relevant government agency and even the plaintiffs for the easement to be extinguished although I sincerely hope that in the spirit of neighbourliness, or what is left of it, the defendant would not have to do so.

[118] The appeal before the Court of Appeal did not concern this part of the judgment and neither did the Court of Appeal comment on this part of the judgment, as the grounds of decision of the Court of Appeal make clear.

[119] In brief, the High Court held that the plaintiffs had effectively waived the part of the "easement right of way" which did not form part of the access road and therefore allowed the third defendant's concrete base fence built on such part to remain, while the Court of Appeal disagreed that there could be such waiver or abandonment of such part of the "easement right of way" and ordered for the concrete-base fence to be removed.

[120] At all times during that litigation, the "easement right of way" was on the register, which was not disputed by the parties.

[121] That litigation come to an end in July 2018 when the Federal Court dismissed the third defendant's application for leave to appeal.

[122] The third defendant submitted the application for extinguishment in September 2018 and this court was and is in agreement with the learned High Court Judge in the previous litigation that the third defendant was entitled to do so.

[123] The first defendant Registrar being satisfied that the "easement right of way" had come to an end because there was now an alternative access to Lot 255 in the form of Cooke's Drive, has now effected the extinguishment by removing the "easement right of way" from the titles, further to s. 141 of the Sarawak Land Code.

[124] The court would note that although in principle an easement of necessity comes to an end by operation of law when the necessity ceases, in a Torrens system, the easement would only formally cease to exist when the easement is removed or cancelled from the title.

[125] For the reasons above stated, the court was of the view the first defendant Registrar had not erred and there was no merit in the instant originating summons and the court dismissed the originating summons accordingly, with costs.